



Institutional arbitration versus ad hoc arbitration: Chinese and Iranian perspectives

MAZIYAR SHOKRANI *

Law, Justice and International Peace Institute, Iran

Abstract

Aim: There are merits and drawbacks to both institutional arbitration and ad hoc arbitration. In contrast to institutional arbitration, which occurs within the framework of an arbitral organisation, ad hoc arbitration, which is not administered by any institution, requires the parties to make their own arrangements for selecting the arbitrators and designating applicable laws and rules of procedure. The point of this piece is to contrast the effectiveness of these forms of arbitration under two distinct legal regimes.

Method: This research will utilise a doctrinal review and a comparative test to examine the two legal systems.

Findings: Institutional arbitration has not been formally introduced into Iran's legal system, and ad hoc arbitral awards are not recognised in China. It is recommended in this paper that Iran adopt institutional arbitration because of its many benefits and that China recognises ad hoc arbitration to honour the autonomy of the parties involved.

Implications/Novel Contribution: The research fills a gap in the existing literature by providing an in-depth analysis of the legal systems in both countries. In both countries, credit is given differently.

Keywords: Institutional Arbitration, Ad Hoc Arbitration, Civil Procedure Law, China, Iran

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INTRODUCTION

Parties who resolve their differences through arbitration do so because they want to avoid going to court. Consequently, arbitration is a private system of adjudication...that grants the parties substantial autonomy and control over the process by which their disputes will be resolved (Lawyer, 2017; Moses, 2017). The 21st century has seen a surge in the use of arbitration as a means of dispute resolution, which is true not only on the domestic front (Boniface, 2016; Merrills, 2017; Sriboonyaponrat, 2016). The arbitration process also allows the parties to select the arbitrator(s) and/or court(s) to decide on the dispute. The New York Convention (Merrills, 2017), to which the vast majority of UN member states are parties, and the neutrality of the arbitration process were two of the most persuasive factors in the parties' decision to refer the dispute to arbitration.

In contrast to ad hoc arbitration, institutional arbitration is conducted within the institutional framework of an arbitral organisation, such as the China International Economic and Trade Arbitration Commission (CIETAC) in Beijing or the Arbitration Center of Iran Chamber (ACIC) in Tehran. The significance of both types of arbitration awards for unrestricted commerce and peaceful resolution of disputes is widely acknowledged. Legal professionals and law firms can significantly contribute to the dispute settlement system and spare themselves the time and expense of going to court by establishing arbitration institutions thanks to the inclusion of institutional arbitration in the Iranian Civil Procedure Law. In contrast, the Chinese judicial system's acceptance of ad hoc arbitral awards not only honours the parties' autonomy but also fosters a more trustworthy and amicable setting in which disputes can be resolved. The next two chapters compare and contrast ad hoc and institutional arbitration in the Chinese and Iranian legal systems, and the final chapter summarises the previous discussion and offers two recommendations. In contrast to similar works, this one is distinguished by its comparative analysis of the two countries and its recommendations.

* Corresponding author: Mazyar Shokrani

† Email: maz.law@live.com

LITERATURE REVIEW

Ad Hoc Versus Institutional Arbitration In China

Brief historical overview

Historically, arbitration has its roots in the early 1900s in China (Tao, 2008). Then, the Constitution for Business Arbitration Office was promulgated by Chinese government. In 1949, following to the founding of People's Republic of China, both domestic and foreign-related systems of arbitration were gradually established (Tao, 2008). After the economic reforms, in 1983, the Regulations on Economic Contract Arbitration of the PRC was promulgated by the State Council which stipulated that economic contract arbitration should be handled by dedicated economic contract arbitration commission established by and within the State Administration of Industry and Commerce (Ambikai & Ishan, 2016; Tao, 2008). Before Arbitration Law became effective on 1 September 1995, China's domestic arbitration system lacked independence and party autonomy and the arbitral awards were without binding force; however, following the promulgation of the Arbitration Law new features were established: free establishment of arbitration commissions, full independence of arbitration commissions, and expanded scope of arbitral subject matter and finality of arbitral award. Today, a large number of arbitration institutions are conducting arbitration proceedings with high volume of cases.

Ad Hoc Arbitration in China

Ad hoc arbitration preceded institutional arbitration in China as it used to be practiced for hundreds and even thousands of years (Zhang, 2013). Despite the advantages of ad hoc arbitration in particular circumstances and the fact that parties are interested to choose ad hoc arbitration, the Arbitration Law only allows the parties to refer their dispute to an institution (Yilmaz, 2017; Zhongcai, 1995). Accordingly, ad hoc arbitration agreements are invalid per se under PRC Arbitration Law. Despite the strict requirement by Arbitration Law, Chinese courts still may enforce ad hoc arbitration awards. In practice, parties are free to place the seat of their arbitration outside China where ad hoc arbitration is accepted and/or to choose a law other than the PRC Arbitration Law to govern the validity of their arbitration agreement when arbitrating inside China.

There is another exception where the Chinese courts enforce the ad hoc arbitral awards. The Supreme People's Court of China (SPC) has adopted a choice-of-law rule that allows ad hoc arbitration agreements to be enforced in China in a great many instances. To achieve this result, however, the parties must draft their agreement carefully, particularly the provisions concerning the arbitration seat or the law applicable to their arbitration agreement. It has also been discussed that the ad hoc arbitration agreements can be enforced if the choice of law is not Chinese law (As & Purba, 2017; Zhongcai, 1995). The newly adopted Law of the Application of Law for Foreign-related Civil Relations of the People's Republic of China also allows the parties to choose the applicable law of arbitration agreement. Article 18 of the mentioned law reads as:

The parties concerned may choose the laws applicable to arbitral agreement by agreement. If the parties do not choose, the laws at the locality of the arbitral authority or of the arbitration shall apply.

Therefore, if the chosen applicable law of arbitration agreement allows ad hoc arbitration, then it may be enforced in Chinese jurisdiction. Still, ad hoc arbitration has opponents in China. In his concluding remarks, Tietie says: The real reasons behind the PRC Arbitration Law's hostility toward ad hoc arbitration seem closely related to arbitration's historical development in China, as well as to China's social and economic structures at the time of the law's promulgation, particularly China's transition from a planned economy to a market economy.¹⁶⁸ At present however, all those reasons essentially no longer exist. As China actively participates in the globalization process, it is becoming more closely connected with the international community.

Institutional Arbitration in China

Institutional arbitration is the only method of arbitration which is explicitly authorized by Chinese law. Article 16 of the Arbitration Law of the People's Republic of China reads as:

An arbitration agreement shall include arbitration clauses stipulated in the contract and agreements of submission to arbitration that are concluded in other written forms before or after disputes arise. An arbitration agreement shall contain the following particulars:

- (1) an expression of intention to apply for arbitration;
- (2) matters for arbitration; and
- (3) a designated arbitration commission.

And, Article 18 reads as: If an arbitration agreement contains no or unclear provisions concerning the matters for arbitration or the arbitration commission, the parties may reach a supplementary agreement. If no such supplementary agreement can be reached, the arbitration agreement shall be null and void.

Thus, a designated arbitration commission is among the obligatory particulars of an arbitration agreement. The question arises while considering if every random commission could be designated as the arbitration institution. But the answer is no since the arbitration commissions shall be registered under Arbitration Law. Tao concludes that A direct consequence becomes that foreign/international arbitration institutions are erased from the list of arbitration institutions available to parties seeking arbitration in China. By metaphor, the Great Wall of China for foreign arbitration institutions was created. Contrary to the common belief that open competition could nourish the growth of Chinese arbitration, some Chinese scholars believe that international commercial arbitration is by nature a legal service and China has no obligation to open up its market to foreign competitors since China made no commitment toward the WTO and its member states. Furthermore, the legal service sector such as arbitration concerns judicial sovereignty (Tao, 2011). As it was seen, Chinese law provided a profitable ground for Chinese arbitration institutions in the absent of foreign competitors.

So far, CIETAC and CMAC (China Maritime Arbitration Commission) are the two key international arbitration commissions in China, with the former dealing with all types of general commercial disputes and the latter concentrating on the resolution of maritime disputes while there is a large number of arbitration institutions dealing with domestic cases.

Ad Hoc Versus Institutional Arbitration in Iran

Brief historical overview

Like China, Iran has its roots of arbitration in ancient time. The history witnessed that arbitration was in practice during Achaemenid and Sasanian dynasties before invasion of Arabs in the 7th century (International Arbitration Law Firm, 2017). In Sasanian dynasty, arbitrators had one of the seven highest positions in ancient Iran where justice and equity were of highest values in Zoroastrian religion (Edna & John, 2012). In the modern era, arbitration was recognized as one of the methods of settlement of disputes by promulgation of the Law of Principles of Civil Trials in 1911. This law was abolished by the Law of Principles of Civil and Commercial Trials in 1935. Article 60 (7) allowed the attorneys of the parties to refer the case to hakamiat with consent of the parties. The first Iranian civil procedure law was promulgated in 1939. The arbitration was systematically included in its Chapter eight where the Article 632 recognizes ad hoc arbitration method. Following the radical changes in Iranian judicial system in 1994, the Public and Revolutionary Courts Procedure Law in Civil Affairs was finally enacted and promulgated in 2000 which is in force till today. Iranian history also witnessed establishment of a very important international arbitration tribunal. The Iran-United States Claims Tribunal came into existence as one of the measures taken to resolve the crisis in relations between the Islamic Republic of Iran and the United States of America arising out of the November 1979 hostage crisis at the United States Embassy in Tehran, and the subsequent freezing of Iranian assets by the United States of America. To date, the Tribunal has finalized over 3,900 cases. Currently on the Tribunal's docket are several large and complex claims between the Islamic Republic of Iran and the United States of America. The Tribunal consists of nine members three appointed by each Government and three (third-country) Members appointed by the six Government-appointed Members.

Ad hoc Arbitration in Iran

Unlike Chinese law, the Iranian law kept the tradition of recognizing ad hoc arbitration while codifying arbitration rules. It appeared in Law of Principles of Civil Trials in 1911, Law of Principles of Civil and Commercial Trials in 1935, and, Public and Revolutionary Courts Procedure Law in Civil Affairs in 2000. Chapter seven of Public and Revolutionary Courts Procedure Law in Civil Affairs deals with arbitration. Article 454 reads: All persons who have the capacity to file a suit may agree to refer their dispute, whether already filed in the court or

not, and if already filed, in any stage of procedure, to the arbitration of one or more persons.

And Article 455 reads: While concluding a contract, or through a separate contract, the parties may agree to refer their dispute to the arbitration and they also may appoint the arbitrator or arbitrators before or after dispute arises.

Note: In all cases of referring to arbitrator, the parties may confer the right of appointment of arbitrator to a third party or to the court.

The two key articles never consider institutional arbitration and just mentioned arbitrator which means it recognizes ad hoc arbitration. The fact is that there was never an arbitration institution in Iran till 2001 when ACIC was established. Therefore, the parties to the dispute may refer their case to any natural person except (1) the persons who lack legal capacity, and (2) the persons who are deprived of conducting arbitration by final award of the court. The appointment of arbitrators is even more difficult when the parties request the court to appoint the arbitrators. In such cases, the court cannot appoint the following persons as arbitrator unless upon consent of the parties e.g. persons aged less than 25 years or persons who are beneficiary in the claim. Although the law recognize the ad hoc arbitration; however, it seems that there is no legal objection for conducting arbitration under institutional rules (Shah & Gandhi, 2011).

Institutional Arbitration in Iran

There was no institutional arbitration explicitly recognized by Iranian law until the idea of institutional arbitration in Iran was first suggested by Prof. Mohsen Mohebbi (Mohebbi, 1996). He suggested the Iranian Bar Association to establish an arbitration association for the purpose of conducting institutional arbitration in 1996 (Mohebbi, 1996). He made a reference to the Law of Amendment of some of Judicial Acts (1956) which allows the attorneys to try to reconcile between the parties. Consequently, Prof. Mohebbi argued that the Bar Association has the legal authorization to establish an arbitration association. Finally in 1997, the institutional arbitration was introduced by Iranian legislative for the first time. The Law on International Commercial Arbitration (ICAL) was enacted and promulgated in November 1997 which closely follows the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration and provided Iran with a modern international arbitration legal framework (Gharavi, 1999).

ICAL's Article 1 defines arbitration as settlement of disputes between the parties outside the court by selected or appointed natural or legal person(s). By mentioning 'natural' or legal persons, it can be understood that the law recognizes both ad hoc and institutional arbitrations. Article 3 expressly mention the institution which reads If there is no agreement between the parties regarding notification, one of the following methods will be considered: (A) In institutional arbitration, the method and competent authority of notification will be in accordance with the related institution; (b) Also Article 6 confers some duties on the related institution in case of institutional arbitration.

Shortly after promulgation of ICAL, the Law of Iran Chamber Arbitration Center Statute was enacted and promulgated in February 2002. Accordingly, the ICAC was established as the first and the main arbitration institution in Iran, dealing with both domestic and international cases; however, different laws apply to domestic and international claims. Chapter seven of Public and Revolutionary Courts Procedure Law in Civil Affairs (2000) applies to domestic claims and The Law on International Commercial Arbitration (2001) applies to international ones. Today, Iran enjoys institutional arbitration through both arbitration centers of provincial chambers of commerce, and, private professional arbitration institutions.

METHODOLOGY

The two legal systems will be studied with the aid of a doctrinal review and a comparative test. Through the doctrinal research method and comparative study of the two legal systems, this paper aimed to evaluate these methods of arbitration in two legal systems. Iran has not explicitly introduced institutional arbitration into its legal system, and China does not recognize ad hoc arbitral awards

RESULTS AND DISCUSSION

Evaluating Arbitration in The Two Legal Systems

China puts weight on institutional arbitration and does not recognize ad hoc arbitration; however, unlike

China, Iran recognizes ad hoc arbitration and Iranian Civil Procedure Law does not expressly deal with institutional arbitration. Tietie believes that lack of recognition of ad hoc arbitrations is rooted in transition from planned economy to market economy. He says Because having a good arbitration system contributes to a country's economic development and because the international commercial arbitration system based on the New York Convention is highly interconnected, the existence of this unreasonable requirement in the PRC Arbitration Law is surely counterproductive for the further development of the Chinese arbitration field and China's continued economic development. As a result, changing this unusual requirement is necessary for China. It seems that China, by recognizing only institutional arbitration, planned to adapt itself with modern arbitration system which can be more in conformity with developed legal systems. A problem which seems to arise in ad hoc arbitration is that the parties may misunderstand about arbitration agreement between themselves. To overcome this problem, it is suggested that that parties can easily incorporate a set of comprehensive and well-prepared rules by reference in their arbitration agreement (Aksen, 1991). However, ad hoc arbitrations can only be successful if there is enough cooperation between the parties; the parties understand the arbitration procedures and the arbitrations are conducted by experiences lawyers and arbitrators. Another important disadvantage is that the ad hoc arbitration awards may not be enforced under certain jurisdictions. Unlike ad hoc arbitration, institutional arbitration is administered by a specialized institution and the proceedings are based on a set of rules and fixed fee schedule and the institution generally serves as a buffer between the parties and the arbitrator which helps to preserve neutrality, uniformity as well as efficiency (Shah & Gandhi, 2011). Institutional arbitration has disadvantages too. The high costs are on the top. Rovin suggests the arbitrators to reduce arbitration costs as an ethical value (Rovine, 2010). Through institutional arbitration in China, it is discussed that the party autonomy could be endangered. For instance, as mentioned previously, CAL [China Arbitration Law] implements a rather stringent requirement on the effectiveness of arbitration agreements, and the Peoples Courts are empowered, along with arbitration institutions, to review and decide the validity of arbitration agreements. Furthermore, Peoples Courts are empowered to - where neither the arbitral tribunal nor the arbitration commission could - review, decide and implement provisional/interim measures. Peoples Courts could also set-aside an arbitral award upon reviewing the merits of the case. As a result, several renowned arbitration institutions are established in China which deal with thousands of cases annually.

Unlike Chinese law (Article 10, Arbitration Law of China), so far, there is no law governing the establishment or activities of private arbitration institutions in Iran which may leads to growth of nonprofessional institutions in the field of arbitration, as we can see in Iran today. There is no renowned arbitration institution in Iran as the culture of settling the dispute outside judicial system is not well-established among Iranians. Although ad hoc arbitration is expressly recognized by Iranian law, the lack of legal knowledge of the arbitrators may not be sufficient to render professional award. The parties may also refer these awards to the court for invalidation. Consequently, arbitration in Iran has not yet been as successful as in China.

CONCLUSION, RECOMMENDATIONS AND IMPLICATIONS

Arbitration is a private system of adjudication which gives the parties substantial autonomy and control over the process that will be used to resolve their disputes which is deeply enrooted in both Iranian and Chinese histories and cultures. Ad hoc arbitration is a proceeding that is not administered by any institution and requires the parties to make their own arrangements for selecting the arbitrators and for designation of rules, applicable law, procedures; however, institutional arbitration takes place within the organizational framework of an arbitral organization. Ad hoc and Institutional arbitrations have both advantages and disadvantages. Chinese legal system does not recognize and enforce ad hoc arbitration awards except in very exceptional cases. Instead, it explicitly recognizes institutional arbitration. Iranian legal system, unlike Chinese one, explicitly recognizes ad hoc method of arbitration; however, impliedly recognizes institutional arbitration too. It expressly recognizes and enforces institutional arbitration awards in international cases since last decade. It is suggested that Chinese legislator recognizes ad hoc arbitration method for that freedom and autonomy of the disputing parties should be respected by law. The ad hoc method of arbitration grants them maximum freedom and autonomy which is one of the main reasons of referring to arbitration. Iranian law provides the parties with such great advantage and imposes minimum conditions as to be the characteristics of the arbitrators. It is also suggested that Iranian law expressly recognizes the institutional arbitration method in domestic cases as well although according to interpretations, there is no objection of doing

so. Like Chinese law, Iranian legislator should impose requirements for registration of arbitration institutions to avoid any ambiguity and make the road clear for the disputing parties to make easier choice of the right institution.

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